Supreme Court, U.S.
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No. 94-322

In the Supreme Court of the United States

OCTOBER TERM, 1994

PAUL STUART, GUARDIAN AD LITEM FOR NICHOLAS STUART AND ADMINISTRATOR OF THE ESTATE OF BABETTE STUART, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court acted within its discretion in barring the admission of certain expert evidence relating to standards of conduct for high-speed police chases.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 23 F.3d 1483. The opinion of the district court (Pet. App. E1-E12) is reported at 797 F. Supp. 800.

JURISDICTION

The judgment of the court of appeals was rendered on March 1, 1994. The court amended its decision slightly and otherwise denied a petition for rehearing on May 24, 1994. Pet. App. B1-B3. The petition for a writ of certiorari was filed on August 22, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 6, 1990, agents of the United States Border Patrol were following a car they believed to be carrying illegal aliens. When the agents switched on the siren of their car, the suspect car sped away, resulting in a chase. During the chase, the suspect car crashed into a car driven by petitioner Paul Stuart, in which members of Stuart's family were passengers. Stuart and his minor son were injured and his wife was killed. Pet. App. A2, A3, E2-E3.

Petitioner brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), in the United States District Court for the Central District of California. Following a bench trial, the district court held that the government agents had not been negligent in their pursuit of the suspect car. Pet. App. E10-E11. To the contrary, the court concluded that the agents had complied with the Border Patrol's written policy governing the operation of Border Patrol vehicles during pursuits and emergency situations, and that the agents had acted reasonably and exercised due care in their actions involving the pursuit. *Id.* at E6. The court found that the Border Patrol agents had acted with "due regard for the safety of others," noting particularly that "the pursuit route was virtually devoid of other traffic, that reasonable speeds and distances between the vehicles were maintained and that the pursuit was brief and took place over a short distance." *Id.* at E11.

The district court also held, in the alternative, that the government was entitled to immunity under Sec-

tion 17004.7(b) of the California Vehicle Code, which provides:

> A public agency employing peace officers which adopts a written policy on vehicular pursuits complying with subdivision (c) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle.

Cal. Veh. Code § 17004.7(b) (West Supp. 1994). See Pet. App. E7-E10. Accordingly, the district court entered judgment for the government.

The court of appeals affirmed. On the issue of immunity, the court held that Section 17004.7(b) of the California Vehicle Code does not apply to officers of the United States in an action under the FTCA, because the federal government's liability under the FTCA is determined with reference to the liability of a private party under like circumstances, not to that of a state governmental entity. Pet. App. A8-A10. The court nonetheless upheld the judgment of the district court, because the district court's finding that the government agents had not been negligent was not clearly erroneous. *Id.* at A10. The court of appeals also rejected petitioner's contention that the district court had erred in excluding certain expert testimony regarding high-speed police chases. *Id.* at A7-A8.

ARGUMENT

1. Petitioner claims (Pet. 11-13) that the district court improperly excluded proffered expert testimony regarding high-speed police chases. The admissibility of expert testimony turns on whether it will assist the trier of fact, *Forest Conservation Council* v. *Devlin*, 994 F.2d 709, 713 (9th Cir. 1993), and its admission or rejection in a particular case is a matter entrusted to the sound discretion of the district court, *id.* at 714. As the court of appeals observed, the questions that elicited the objections in this case "appeared to seek an opinion on whether probable cause existed to stop the [suspect vehicle]," Pet. App. A8, a point on which the district court required no expert assistance, *ibid.* As the court of appeals also observed, the proffered testimony concerning standard police procedures might not have shed light on what is reasonable conduct for Border Patrol officers. *Ibid.* Accordingly, the court of appeals correctly held that the district court did not abuse its discretion in excluding the evidence.

There is no circuit conflict on this issue. The one case petitioner cites (Pet. 12-13) as conflicting, *Tomcsik* v. *United States*, 720 F. Supp. 588 (E.D. Mich. 1989), aff'd, 917 F.2d 564 (6th Cir. 1990) (Table), cert. denied, 499 U.S. 948 (1991), did not purport to hold that expert testimony on the appropriate standards for high-speed chases must always be admitted. That the court in *Tomcsik* chose to admit such testimony shows, at most, that the district court there made a discretionary decision regarding the admission of evidence different from the decision made by the district court in this case.

2. Petitioner argues (Pet. 18) that, in cases brought under the FTCA, the United States should not enjoy immunities granted by state law to state

governmental entities. That contention cannot be a basis for review, because the court of appeals expressly accepted petitioner's argument that the federal government's liability in an FTCA suit must be governed by that of a private party under like circumstances, not by that of a state governmental entity. Pet. App. A8-A10. The Ninth Circuit did not hold that "Border Patrol agents may not be held liable for initiating vehicular pursuits," Pet. 14; rather, it affirmed the district court's finding that the Border Patrol agents did not act negligently in this case.

3. Petitioner also claims (Pet. 14-18) that this case presents a conflict between the "discretionary function" exception to the FTCA, 28 U.S.C. 2680(a), and a similar discretionary function exception applicable to tort actions against state entities under California law. Petitioner acknowledges that neither the district court nor the court of appeals even discussed the discretionary function exception. Petitioner argues (Pet. 14), however, that the Ninth Circuit's holding that the exclusion of the expert testimony was not an abuse of discretion necessarily implies that the proffered testimony was not relevant to the issue of negligence because the agents were immune from liability. This interpretation of the court's holding is flatly contradicted by the language of the court's opinion, which makes clear that the expert testimony was rejected solely on the ground that the district court found the proffered testimony unhelpful to its determination of negligence. Pet. App. A7-A8. Neither the district court's rejection of the expert testimony nor the district court's ultimate finding that the agents were not negligent implicated in any way the discretionary function exceptions to liability under state or federal law.

4. Finally, petitioner asks (Pet. 19) this Court to establish that the government may be held liable for its employees' "negligent failure to balance the risk of harm to the public posed by initiation of the pursuit against the need to apprehend the suspects." The appropriate standard for negligence in high-speed police chases is not properly before this Court. That standard is a matter of state, not federal, law. Moreover, on the merits, neither the district court nor the court of appeals implied that officers should not balance the risk of harm to the public against the need to apprehend the suspects. To the contrary, the district court found, under the facts of this case, that the Border Patrol agents acted "with due regard for the safety of others," Pet. App. E11, and concluded that the agents were not negligent. The court of appeals affirmed that finding as not clearly erroneous. *Id.* at A10. Petitioner's disagreement with the district court's conclusions is fact-specific and raises no question of general importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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